STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory Determination filed by the PACIFIC LEGAL FOUNDATION regarding the DEPARTMENT OF FISH AND GAME'S "Mitigation Guidelines for Swainson's Hawks (Buteo Swainsoni) in the Central Valley of California," September 1990[1]	)	**1998 OAL Determination No. 20**
	)	**[Docket No. 91-020]**
	)	**September 21, 1998**
	)	**Determination Pursuant to Government Code Section 11340.5 and Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: EDWARD G. HEIDIG, Director

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SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether Guidelines issued by the Department of Fish and Game contain "regulations" which are void unless adopted pursuant to the Administrative Procedure Act ("APA"). The Guidelines prescribe mitigation measures required of persons planning construction projects in the Central Valley that may adversely affect the habitat of a particular species of hawk, which was previously declared a "threatened" species under the California Endangered Species Act ("CESA") by the Fish and Game Commission.

The primary issue is whether the Guidelines' interpretation of the word "take" as used in CESA (i.e., Fish and Game Code section 2080) to encompass the

destruction of habitat is a "regulation" issued in violation of the statutory prohibition on agency issuance of underground regulations. Government Code section 11340.5.

OAL has concluded that:

(1) the matter is not moot. OAL cannot accept the Department's suggestion that the matter should be dropped because the challenged 1990 Guidelines have been revised since the request was filed. Having properly filed a request concerning a specific document, the Pacific Legal Foundation is entitled to a determination.[3]

(2) this determination cannot encompass revisions made to the 1990 Guidelines after the request was filed. Under governing procedural regulations,[4] OAL cannot accept the Pacific Legal Foundation's suggestion that OAL render an opinion in *this* determination concerning the validity of material that was not part of the request accepted by OAL.

(3) portions of the 1990 Guidelines are no more than items of scientific information which do not constitute "regulations," including, for instance, "Swainson's hawks weigh approximately 800-1100 gm. (1 3/4 - 2 lbs), and have about a 125 cm. (4 plus ft) wingspan."

(4) the 1990 Guidelines contain "regulations" which were issued and utilized in violation of Government Code section 11340.5: for example, the statement that *the Department interprets the "take" clause in the California Endangered Species Act to include* not only the direct killing of individual hawks, but also *the destruction of either nesting or foraging habitat necessary to maintain the reproductive effort.* "Regulations" found in the Guidelines are specified in part III.B of this determination.

If the Department wishes to exercise its discretion to issue standardized mitigation guidelines, it may propose regulations pursuant to the APA for public notice and comment, review by OAL, and publication in the California Code of Regulations. Unlike the 1993 opinions of the Legislative Counsel and the Attorney General, OAL takes no position on the question of whether the guidelines are consistent with and authorized by CESA. These consistency and authority issues will be

explored in the public comment and OAL review processes, if the Department elects to adopt mitigation regulations.

ISSUE

The Office of Administrative Law ("OAL") has been requested to review the *Mitigation Guidelines for Swainson's Hawks (Buteo Swainsoni) in the Central Valley of California [DRAFT 9/90]* ("1990 Guidelines," "Mitigation Guidelines," or "Guidelines") issued by the Department of Fish and Game ("Department" or "DFG"). OAL is charged with determining[5] whether the Guidelines contain "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI- LEGISLATIVE ENACTMENTS?

The Department is a subdivision of the Resources Agency,[6] and works in coordination with the Fish and Game Commission ("Commission"). General policies for the conduct of the Department's affairs are formulated by the Commission.[7] Fish and Game Code section 702 (as amended in 1996) provides that:

> "[The Fish and Game Code] *shall be administered and enforced through regulations adopted only by the department*,[8] except as otherwise specifically provided by this code or where this code requires the commission to adopt regulations." (Emphasis added.)[9]

As a general rule, the APA's rulemaking procedures are required of any agency rulemaking. Government Code section 11346 provides, in part:

> "It is the purpose of this chapter to *establish* basic minimum procedural *requirements for* the adoption, amendment or repeal of *administrative regulations*. Except as provided in Section 11346.1 [emergency regulations], the *provisions* of this chapter *are applicable to the exercise of*

any quasi-legislative power conferred by any statute heretofore or hereafter enacted . . . ." (Emphasis added.)

Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2, Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, *department*, division, bureau, board, and commission. . . ." (Emphasis added.)

This statutory definition applies to the APA; it helps determine whether a particular "state agency" must adhere to APA rulemaking requirements.[10]

The APA narrows the definition of a "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[11] The Department is in the executive branch of state government.[12] Therefore, the Department is a "state agency" within the meaning of the APA. The Legislature has stated unequivocally that the Department is to administer and enforce the Fish and Game Code through adopted "regulations."[13]

Accordingly, OAL concludes that the APA is generally applicable to the Department's quasi-legislative enactments.

II. Background

The California Endangered Species Act

The California Endangered Species Act ("CESA") directs the Fish and Game *Commission* to establish lists of not only "endangered," but also "threatened" species. An "endangered" species is one threatened with extinction.[14] A "threatened" species is one that "although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of . . . special protection and management efforts."[15] CESA mandates a large measure of public participation in the process of adding (or subtracting) a species to (or from) either list: the Commission is expressly required to follow APA rulemaking procedures in making such decisions.[16] In practice, the Commission

follows APA procedures and prints the lists in the California Code of Regulations. The decision to add Swainson's hawk to the threatened list was made through the APA rulemaking process. See Title 14, California Code of Regulations, section 670.5(b)(5)(A).

The Commission is also directed in Fish and Game Code section 2071 to:

> "adopt *guidelines* by which an interested person may petition the commission to add a species to, or to remove a species from either the list of endangered or the list of threatened species." (Emphasis added.)

The Commission has adopted the required petition guidelines pursuant to the APA; they are printed in the California Code of Regulations, Title 14, section 670.1. Since the petition guidelines clearly are general rules designed to govern Commission procedure[17] in the endangered species area, the Commission was required by the APA to formally adopt the guidelines pursuant to the APA.

The *Department* is generally directed to administer and enforce the Fish and Game Code through regulations adopted solely by the Department (in contrast to regulations adopted solely by the Commission with the assistance of the Department).[18] The Department, in addition to the Commission, is assigned duties under CESA.

Fish and Game Code section 2090, subdivision (a), provides in part:

> " . . . each state lead agency shall consult with the department, in accordance with *guidelines developed by the department*, to ensure that any action authorized, funded, or carried out by the state lead agency is not likely to jeopardize the continued existence of any endangered or threatened species." (Emphasis added.)

The Department is assigned two duties in subdivision (a). One is to consult with state lead agencies. A second implied departmental duty is to develop "guidelines" to be used as the framework within which consultations with state lead agencies will occur.

The Swainson's hawk mitigation Guidelines that are the subject of this request for determination state on page six that they are intended to be used for "*consultation under* California Environmental Quality Act (CEQA) and/or *California Endangered Species Act (CESA).*" (Emphasis added.)[9] The Guidelines state correctly on page six that "pursuant to *Article 4* of CESA, State agencies are required to consult with the DFG . . . ." Fish and Game Code section 2090 is located in *Article 4* ("State Agency Consultation") of CESA.

Thus, the Department has in effect been mandated by statute to develop a set of mitigation guidelines focusing specifically on Swainson's hawk. The Department has complied with this mandate. Although the Department has drafted the Guidelines, it has not taken the next step of adopting them through the formal APA rulemaking process (public notice and comment, OAL review, printing in the CCR). If the Guidelines contain any "regulations," then these "regulations" are invalid--unless covered by an express statutory APA exemption.

III. DO THE CHALLENGED GUIDELINES CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision in Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . .. [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any guideline, criterion*, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in

subdivision (g) of Section 11342, *unless* the *guideline, criterion,* bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[20] the California Court of Appeal upheld OAL's two-part test[21] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" [Emphasis added.][22]

A. DO THE CHALLENGED GUIDELINES CONTAIN "STANDARDS OF GENERAL APPLICATION?"

As the Pacific Legal Foundation correctly points out, Government Code section 11340.5 prohibits state agencies from issuing or utilizing "any *guideline, criterion*, . . . standard of general application, or other rule" which is a "regulation" as defined in the APA. (Emphasis added.)

The key word in the title of the agency rule challenged in this proceeding is "Guidelines." Page one of the Guidelines explains that the document contains "criteria" developed to further the "established" goal of no net loss of habitat. Pages 6-10 of the Guidelines bear the heading "Mitigation Criteria." Clearly, a document labeled "Guidelines" containing "criteria" is precisely the sort of agency document the Legislature sought to prohibit in Section 11340.5, insofar as the document contains "regulations," which should have been, but were not, adopted pursuant to the APA. In determining if the Guidelines contain "regulations," OAL first considers whether the Guidelines contain standards of general application. For an agency rule to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[23]

Items of Scientific Fact

As the Department correctly points out in its response, some scientific material in the Guidelines fails to satisfy the first part of the two part test: it is not a standard of general application. For instance, the "Natural History" section of the Guidelines (page 3) contains a description of the bird in question, including the following:

> "Swainson's hawks weigh approximately 800-1100 gm. (1 3/4 - 2 lbs), and have about a 125 cm. (4 plus ft) wingspan."

This is simply a fact.

Scientific material could be problematic. For instance, if the most current scientific thinking indicates that the species name of a bird duly listed in the CCR

as endangered is incorrect and should be changed from "A" to "B," that change must be made through the rulemaking process, with full public participation.

Applies to all lead agencies and project sponsors

Putting the purely factual scientific material to one side, it is clear that the Guidelines apply generally to all persons planning projects "in the Central Valley of California" which may affect Swainson's hawks directly, their nests, or their nesting or foraging habitat. The Guidelines state forthrightly on page one that these:

> "criteria provide guidelines *for lead agencies and project sponsors* to follow in developing adequate mitigation for the loss of Swainson's hawk habitat." (Emphasis added.)

An agency rule that applies generally to all lead agencies and project sponsors planning development projects in the Central Valley of California would appear to be a standard of general application.

In its response, the Department contends that the Guidelines are not standards of general application. A variety of similar arguments are made in support of this contention:

(1) an agency rule cannot be a standard of general application unless it is "in effect"; an agency rule cannot legally be "in effect" unless it has been adopted pursuant to the APA and filed with the Secretary of State; since the Guidelines have not been adopted pursuant to the APA and filed with the Secretary of State, they are not "in effect," and since they are not "in effect," the Guidelines are not standards of general application.

(2) an agency rule cannot be a standard of general application unless it is intended to be mandatory (or "binding") and is phrased in mandatory language; since the Guidelines were not intended by the Department to be mandatory and "are replete with" permissive language, the Guidelines are not standards of general application.

(3) because the Guidelines acknowledge that "precise determinations of

appropriate mitigation must be made on a case-by-case," they are not standards of general application.

OAL will discuss these arguments in order.

First, OAL rejects the argument that an agency rule cannot be a standard of general application unless it has been formally adopted as a regulation pursuant to the APA. The purpose of Government Code section 11340.5 is to prohibit agencies from issuing or using agency rules which meet the APA's definition of "regulation," and thus should have been, but were not, adopted after public notice and comment pursuant to the APA. Section 11340.5 protects the public's right to meaningful participation in the policy development process.

The Department's argument cannot be reconciled with Section 11340.5, governing case law, or prior OAL determinations. An example of a case is *Engelmann v. State Board of Education* (cited above), in which the Court invalidated textbook selection "procedures and *criteria*" (emphasis added) as "regulations" issued in violation of Government Code section 11340.5. An example of a determination is 1988 OAL Determination No. 5, in which OAL concluded that the Wetlands Resource Policy of the Fish and Game Commission was a "regulation" issued in violation of section 11340.5.[24]

If the Department's "in effect" argument stated the law correctly, it would be impossible for any state agency to ever violate Section 11340.5.

Second, OAL cannot accept the proposition the Guidelines are not standards of general application because they are not stated in mandatory terms or intended to be mandatory. OAL reaches this conclusion for several reasons: (a) the fundamental premise of the Guidelines is that substantial compliance with the criteria is necessary to avoid criminal prosecution; (b) though the terminology varies, there are many explicitly mandatory requirements, and the point is made several times that the listed criteria are minimums, which may in the future be made more stringent; and (c) agency rules need not be stated in mandatory terms in order to meet the statutory definition of "regulation."

(a) Substantial Compliance to Avoid Criminal Prosecution

In the view of the Pacific Legal Foundation, the most important single provision of the Guidelines is the Department's broad definition of the statutory term "take." OAL will review this provision in detail as a statutory interpretation under part III.B of this determination. For now, OAL will examine it briefly in the context of the Department's "standard of general application" argument.

Briefly, the Department interprets the "take" clause in the California Endangered Species Act (Fish and Game Code section 2080) to include not only the direct killing of individual Swainson's hawks, but also *the destruction of either nesting or foraging habitat necessary to maintain the reproductive effort.* This interpretation applies to all persons planning construction projects in the Central Valley which will or might destroy the specified habitat. According to Fish and Game Code section 12008, violation of Section 2080 is punishable by a fine of not more than $5000 or by a year in the county jail, or both. Thus, for instance, a person who, in the process of constructing a marina on the Sacramento River, destroys nesting or foraging habitat, would violate Section 2080 and be subject to criminal prosecution under Section 12008.

However, a project planner who takes adequate mitigation measures consistent with the Guidelines, would not be subject to criminal prosecution. This appears to be a classic "safe harbor" provision, that is, an official agency pronouncement that if a member of the regulated public follows a course of action specified by the regulatory agency, that that person will *not* be subject to prosecution under a statute that would otherwise appear to generally prohibit certain conduct.

It is hard to imagine a better way to encourage compliance with "guidelines" by project sponsors than by stating expressly that inconsistent conduct is "punishable by fines and/or imprisonment." OAL concludes that this statement concerning possible criminal penalties for habitat destruction is in itself a standard of general application (see part III.B of this determination).

(b) Mandatory Language

Furthermore, there is a substantial amount of clearly mandatory language in the Guidelines. One of the guidelines states:

"If the nest tree is to be removed and fledglings are present, the nest tree *may not* be removed until September 15 or the DFG has determined that the young have fledged or are no longer dependent on the nest tree." (Page 7: emphasis added.)

Technically, this may be a "prohibition" rather than a "mandate," but it is nonetheless clearly language intended to strictly regulate behavior. Again, this instruction must be read in the context of the earlier admonition (Guidelines, p. 2) that disturbance that causes nest abandonment "is punishable by fines and/or imprisonment."

The Department of Fish and Game has territorial jurisdiction over the entire state of California, including the portions of the Central Valley providing habitat for Swainson's hawk. Further, the Department made clear in the Guidelines that it had power to enforce or ensure mandatory compliance with the Guidelines by stating that persons who destroyed habitat or disturbed nests were subject to specific criminal sanctions.

(c) Need not be stated in Mandatory Terms

Uncodified agency rules that state expressly that they are binding, or which contain explicit mandatory language are easily classified as underground regulations. However, the definition of "regulation" found in Government Code section 11342, subdivision (g), is not restricted to statements which contain express language stating they are binding or mandatory. According to the California Court of Appeal, it is not necessary that the rule require affirmative conduct by an affected party.[25] The statutory test requires only that the statement contain a general rule which implements, interprets, or makes specific the law the agency enforces. Thus, an agency rule which defines the term "wetlands" should be found to violate the APA, even if the definition standing alone lacks express mandatory language.[26] More important than the agency's characterization of the challenged rule is the nature of the effect and impact of the rule on the public.[27]

Third, the Department argues that:

" . . . the Guidelines acknowledge that precise determinations of appropriate mitigation must be made on a case-by-case basis. For example, the

Guidelines state that '(exact implementation of this measure (regarding prevention of nest disturbance) will be based upon specific information at the project site.' Guidelines, p. 7. In addition, the Guidelines make clear that mitigation ratios may vary depending on the circumstances and the scientific information available at the time. Guidelines, p. 9."

OAL recognizes that there is language in the Guidelines indicating that some criteria may be modified under certain circumstances. However, these provisions are overshadowed by clearly mandatory provisions. OAL will closely review the two Guideline provisions in the preceding paragraph quoted from the Department's response. On Guidelines, page 7, just before the "exact implementation" sentence, is the following:

> "If construction or other project-related activities which may cause nest abandonment or forced fledging are proposed within this ½ mile buffer zone, *intensive monitoring (funded by the project sponsor) by a Department approved raptor biologist will be required.*" (Emphasis added.)

The italicized passage contains four separate general rules: (1) intensive monitoring will be required, (2) it must be funded by the project sponsor, and (3) it may be performed only by a raptor biologist, (4) who has been approved by the Department. There appears to be (at a minimum) a rebuttable presumption that the full range of disturbance prevention requirements will apply, unless waived by the Department "based upon specific information at the project site." According to the California Court of Appeal, an agency rule structured as a rebuttable presumption is nonetheless a "regulation" for purposes of the APA.[28]

It is true that page 9 of the Guidelines states that mitigation ratios may vary depending on the circumstances and the scientific information available at the time. However, the complete paragraph states:

> "c. *Mitigation for foraging areas shall be a minimum 1:1 acre ratio (i.e., 1 acre replacement for each 1 acre loss of habitat.* Increased mitigation ratios may be necessary in certain instances in order to maintain adequate foraging habitat to support Swainson's hawk populations or if a project site provides breeding or forage habitat for more than one pair. Habitat conservation plans for several areas are currently being prepared which may

identify new information regarding habitat requirements for nesting pairs. Therefore, these criteria are to be considered interim guidelines and mitigation ratios may increase for future projects based on additional information from scientific research on this species." (Emphasis added.)

The italicized first sentence in the quoted paragraph clearly articulates a standard of general application setting a "minimum" mitigation ratio. It uses the mandatory term "shall." Nothing in the balance of the paragraph lessens this "minimum" standard. The additional comments merely indicate that the minimum requirement may later be raised to a higher level, presumably meaning that the one acre mitigation requirement might be raised to, for example, one and one-half acres.

OAL concludes that, except as noted above, the Guidelines are standards of general application, thus satisfying the first part of the two part test.

B. DO THE PARTS OF THE CHALLENGED GUIDELINES FOUND TO BE STANDARDS OF GENERAL APPLICATION IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

Clearly, the Guidelines are generally intended to implement, interpret, and make specific the mitigation provisions of the California Endangered Species Act. The Guidelines also contain general rules governing the statutory consultation procedure mandated by CESA.

OAL will discuss, first, how parts of the Guidelines merely restating existing law; second, how the Guidelines implement, interpret, and make specific the CESA consultation provision (Fish and Game Code section 2090); third, how the Guidelines interpret the CESA "take clause" (Fish and Game Code section 2080); and, fourth, how the mitigation criteria specified in the Guidelines (e.g., requirements for mitigation banks) implement CESA mitigation provisions.

First, the Department asserts that the Guidelines are not "regulations" because "in large part" they do no more than restate existing law.[29] In the abstract, it is correct that agency rules which do no more than restate existing law are not subject to the APA. According to *Engelmann v. State Board of Education* (1991), agencies need

not adopt as regulations those rules contained in a statutory scheme which the Legislature has already established:

> "But to the extent that any of the [agency rules] *depart from, or embellish upon* express statutory authorization and language, the [agency] will need to promulgate regulations . . . ." [30, 31] (Emphasis added.)

OAL's independent review of the Guidelines reveals these examples of restatement:

- on page 2, the Guidelines state that "sections 3503, 3503.5, 3800 of the Fish and Game Code prohibit the take, possession, or destruction of birds, their nests or eggs";

- on page 7, the Guidelines quote Government Code section 66474, subdivision (e), as directing local legislative bodies to deny approval of development plans which "are likely to cause substantial environmental damage . . . ."

However, Guideline provisions do *not* constitute restatements of existing law insofar as they fill in gaps in the statute, define statutory terms, or otherwise "implement, interpret, or make specific" the statute.

Second, Fish and Game Code section 2090 provides for departmental consultation and impliedly requires the Department to develop guidelines to promote the continued existence of threatened or endangered species:

> "[E]ach state lead agency shall consult with the department, in accordance with *guidelines developed by the department, to ensure that any action* authorized, funded, or carried out *by the state lead agency is not likely to jeopardize the continued existence of any endangered or threatened species*. . . . ."

Two key "guidelines"were developed by the Department,[32] which had the effect of triggering the need for intensive consultation between state lead agencies and the Department. One, if DFG records indicate that territory has been used "at least once" for nesting purposes, then that territory is defined as Swainson's hawk

breeding habitat. Two, all territory "within a 10-mile radius" of the spot listed by DFG as having been used for nesting at least once is generally defined as foraging habitat. Thus, these two key guidelines specify when intensive consultation is required under Section 2090.

OAL concludes that the Guidelines implement, interpret, and make specific Fish and Game Code section 2090, a law enforced and administered by the Department.

Third, we will discuss the Guidelines' interpretation of the CESA "take" clause, found in Fish and Game Code section 2080. The Guidelines state, in part, at page 2, under the heading "Legal Status":

> "*The DFG has interpreted the 'take' clause in the CESA to include the destruction of either nesting and/or foraging habitat necessary to maintain the reproductive effort.* Implementation of the take provisions of the CESA requires that project-related disturbance at active Swainson's hawk territories be reduced or eliminated during critical phases of the nesting cycle (March 1 - August 15 annually). Disturbance that causes nest abandonment and/or loss of reproductive effort (e.g., killing or abandonment of eggs or young) is considered 'taking' and is punishable by fines and/or imprisonment." (Emphasis added.)

The Pacific Legal Foundation alleges, and the Department does not deny, that this quoted passage interprets Fish and Game Code section 2080, which provides:

> "*No person shall* import into this state, export out of this state, or *take*, possess, purchase, or sell within this state, *any species*, or any part or product thereof, *that the commission determines to be* an endangered species or *a threatened species*, or attempt any of those acts, except as otherwise provided in this chapter, the Native Plant Protection Act (Chapter 10(commencing with Section 1900) of this code), or the California Desert Native Plants Act (Division 23 (commencing with Section 80001) of the Food and Agricultural Code)." [Emphasis added.]

Section 86 of the Fish and Game Code defines the term "take" as follows:

> "*'Take' means* hunt, pursue, catch, capture, or *kill*, or attempt to hunt, pursue, catch, capture, or kill." (Emphasis added.)

Fish and Game Code section 2 provides the scope of the definitions set forth in that Code, as follows:

> "Unless the provisions or the context otherwise requires, these *definitions*, rules of construction, and general provisions *shall govern the construction of this code* and all regulations made or adopted under this code." [Emphasis added.]

Thus, the meaning given "take" in Section 86 is the meaning which must be given to "take" as that term used in Section 2080. As the Pacific Legal Foundation points out:

> "The term 'take' is not defined with the CESA, although other pertinent terms are defined. DFG has adopted a standard interpreting the term 'take.' [The Guidelines state:] 'The DFG has interpreted the "take" clause in CESA to include the destruction of either nesting and/or foraging habitat necessary to maintain the reproductive effort.'"[33]

The Department did not specifically respond to this point or otherwise discuss the "take" issue in its response.[34]

The key issue is whether habitat destruction constitutes "take" within the meaning of the "take" clause of section 2080.

Neither Section 2080 nor Section 86 expressly states that habitat destruction constitutes "take."

In *Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) ("*ACID*"),[35] the California Court of Appeal ruled that the "take" clause of section 2080 proscribes the direct "killing" of an endangered species: not only direct killing resulting from hunting or fishing, but also direct killing incidentally resulting from lawful activities such as operation of pumps by an irrigation

district. In the *ACID* case, the District had pumped water from the Sacramento River, killing winter-run chinook salmon (an endangered species), which were drawn into the pumps. In this litigation, the Department urged the Court to disregard a friend of the court brief "as immaterially focussing on *indirect harm* rather than *direct destruction*." (Emphasis added.)[36] Thus, the apparent intent of the *ACID* court was to limit its holding to "direct destruction," or in other words "direct killing."

Thus, neither the plain language of CESA (i.e., section 2080) nor the judicial interpretation of that statute provides that habitat destruction constitutes "take."

The Department has thus supplemented the statute by interpreting "take" to encompass not only the direct killing of individual hawks, but also the destruction of either nesting or foraging habitat necessary to maintain reproduction.

OAL concludes that the Department has thus implemented, interpreted *and made specific* the "take" clause of Fish and Game Code section 2080. The Guidelines interpretation of the CESA "take"clause is a "regulation" within the meaning of the APA.

Fourth, OAL will discuss how the mitigation criteria specified in the Guidelines (e.g., requirements for mitigation banks) implement, interpret, and make specific CESA mitigation provisions.

CESA provides that state agencies should not approve projects which would result in the destruction or adverse modification of habitat essential to the continued existence of any endangered or threatened species; that reasonable and prudent *alternatives* to such projects should be developed. (Fish and Game Code section 2053.) It further provides that:

> "The Legislature further finds and declares that, in the event specific economic, social, or other conditions make infeasible such alternatives, individual projects may be approved if *appropriate mitigation* and enhancement *measures* are provided." (Fish and Game Code section 2054; emphasis added.)

Fish and Game Code section 2090 requires that the Department ensure, in accordance with guidelines developed by the Department, that any project carried out by a state lead agency "is not likely to jeopardize the continued existence of any endangered or threatened species." Under section 2090, the Department must also determine whether a planned project would "result in the destruction or adverse modification of habitat essential to the continued existence of the species."

Clearly, numerous rules contained in the challenged Mitigation Guidelines implement, interpret, and make specific section 2090, as well as other CESA provisions dealing with mitigation issues. These Mitigation Guidelines go far beyond merely restating existing law: for instance, by specifying a minimum 1200 acre size for mitigation banks. OAL concludes that these criteria implementing statutory habitat protection and mitigation requirements are "regulations."

In summary, OAL concludes that the following italicized parts of the Mitigation Guidelines are "regulations":

1. *DFG interprets the "take" clause in the California Endangered Species Act to include* not only the direct killing of individual Swainson's hawks, but also *the destruction of either nesting or foraging habitat necessary to maintain the reproductive effort.*

2. *Implementation of CESA's "take" clause requires that project-related disturbance at active hawk territories be reduced or eliminated during critical phases of the nesting cycle (i.e., March 1- August 15 annually).*

3. *Disturbance that causes nest abandonment and/or loss of reproductive effort (e.g., killing or abandonment of eggs or young) is "taking" under CESA and is punishable by fines and/or imprisonment.*

4. *Translocation of active nests as a technique for enabling development to proceed will not be permitted.*

5. *If the nest tree is to be removed and fledglings are present, the nest tree may not be removed until:*

   A. *September 15 or*
   B. *the DFG has determined that the young have fledged or are no longer dependent on the nest tree.*

6. *If construction or other project-related activities which may cause nest abandonment or forced fledging are proposed within [the mandated] ½ mile buffer zone, intensive monitoring (funded by the project sponsor) by a Department approved raptor biologist will be required.*

7. Projects should be designed to avoid direct and indirect impacts to nest trees. *Revegetation of historical nesting habitat with suitable native nest trees species (e.g., oaks, cottonwoods, sycamores, etc.) adjacent to adequate forage habitat shall be undertaken.*

8. *Proposed development projects may be required to mitigate impacts not only at active nest sites, but also in surrounding foraging (feeding) areas.*

9. The Department will, generally, oppose projects affecting Swainson's Hawk habitat *unless there is, at a minimum, no net loss of breeding or foraging habitat.*

10. There are two types of habitat, breeding and foraging.

    A. Breeding habitat is either (1) territory in which an active nest is located or (2) territory which has been used for nesting purposes *at least once, as determined by the Department's Swainson's hawk nesting records.*

    B. Foraging habitat is all territory *within a 10 mile radius* of an identified nesting area.

11. Mitigation will be required for all *lands within the defined foraging area (10 mile radius)*, except for the following:

A. Lands which are currently in urban use.

B. Lands that have *no existing or potential value for foraging as determined by site specific surveys by a DFG qualified raptor biologist.*

12 Mitigation for foraging areas shall be *a minimum 1:1 acre ratio (i.e., a acre replacement for each one acre loss of habitat.*

13. *Increased mitigation ratios (additional replacement land) may be necessary:*

A. in certain instances to maintain adequate foraging habitat, or

B. If a project site provides breeding or foraging habitat for more than one pair of hawks.

14. Mitigation banks are permissible *if all of the following minimum criteria are satisfied:*

A. *Minimum acreage size of 1200 contiguous or semi-contiguous acres of undeveloped land.* Smaller individual projects may participate in mitigation banks or fee assessment programs to acquire the minimum acreage needed to support of nesting pair.

B. Creation or enhancement of riparian woodlands may be required for some projects. These riparian areas should be *not less than 300 feet wide, with the successful establishment of native riparian species*, such as cottonwoods, oaks, sycamores, and willows. Revegetation *plans* submitted by the project sponsor *shall include* but is not limited to the following: *(1) tree densities, (2) species compositions, (3) amount of cover, (4) compensated revegetation for loss due to fire or pests.*

C. *Agricultural practices shall be incorporated into the bank or mitigation area to produce crop types such as, but not limited to: alfalfa, dry pasture or native grassland with little or no grazing, disced fields with hedge rows left approximately every 100 feet, and tomato, beet, row crop fields, or other crops which are compatible for foraging hawks.*

D. *Fee title to land or permanent conservation easements obtained for DFG or its designee.*

E. *Management and operation plans must be incorporated into the mitigation plan and implemented by the project proponent prior to project construction.*

G. *Project proponent is responsible for the successful establishment nesting/foraging areas in perpetuity. Monitoring programs require an annual written review submitted to DFG for an initial period of 5 years, and thereafter written reviews will be required every three to five years for private mitigation projects.*

15. Mitigation Guidelines are *in effect until a comprehensive Swainson's Hawk Habitat Conservation Plan is completed* by the Department.

Item 14, above, concerning mitigation banks, is of special interest because it was the subject of 1993 legislation.

The Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993 provided that the Department, in cooperation with other state and federal agencies:

> "*. . . shall adopt regulations that establish standards and criteria for the bank site qualification process*, for the evaluation of wetland habitat acreage and values created at the bank sites, and for the operation and evaluation of bank sites, and any other regulations that are necessary to implement this chapter." (Fish and Game Code section 1784; emphasis added.)

Though Swainson's hawk habitat is not limited to wetland areas, this statute clearly reveals legislative intent that mitigation bank standards and criteria be adopted as regulations.

IV. DO THE PARTS OF THE CHALLENGED GUIDELINES FOUND TO BE "REGULATIONS" FALL WITHIN ANY *SPECIAL*[37] EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[38] In *State Water Resources Control Board v. Office of Administrative Law* (1993), the California Court of Appeal struck down as an "underground regulation" an amendment to a regional water quality control plan that (1) defined the term "wetlands" and (2) set mitigation requirements for developments causing "discharges to wetlands."[39] The Water Board argued that the Legislature did not intend that "regulations" contained in regional plans be subject to APA adoption procedures. The Court rejected this argument, noting that when the Legislature intended for regulatory material to be exempt from the APA, it "acted expressly" to accomplish that end. As examples of legislation creating *express* exemptions from the APA, the Court cited Government Code section 11351 (Public Utilities Commission); Government Code section 11342.5 (now, 11357, subdivision (b)) (Department of Finance); Labor Code section 1185 (Industrial Welfare Commission), and Public Resources Code section 30620, subdivision (a)(3), together with section 30333 (California Coastal Commission).[40]

The Coastal Commission exemption found in the Public Resources Code (cited by the Court) is especially relevant here because it involved "interpretive guidelines" which, among other things, set out mitigation requirements for developments in the coastal zone.[41] Thus, mitigation guidelines contained in Coastal Commission documents covered by the express statutory exemption were not subject to APA requirements *even though they contained "regulations"* because the Legislature had clearly expressed its intention in statute (consistent with Government Code section 11346) that the APA did not apply to such regulatory guidelines. By contrast, mitigation guidelines contained in Water Board documents were determined by the Court to violate the APA insofar as they contained "regulations." The Coastal Commission mitigation guidelines were upheld against attack under the APA because of the express statutory exemption. The Water

Board mitigation guidelines, on other hand, were invalidated as violative of the APA because they were *not* covered by an express statutory exemption.

In its response, the Department does not contend that any *special* express statutory exemption applies to the Swainson's hawk Guidelines. OAL's independent legal research has not located any such exemption. Accordingly, OAL concludes that no special exemptions apply here.

V. DO THE PARTS OF THE CHALLENGED GUIDELINES, FOUND TO BE "REGULATIONS," FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Having established that no special express APA exemption applies to the regulatory portions of the Guidelines, OAL will consider whether any *general* express statutory exemption applies.[12]

THE "INTERNAL MANAGEMENT" EXCEPTION

The Department states that one purpose of the Guidelines is to "assign responsibility within the agency for efforts to restore the species population." (P. 1) Further, the Department states that:

> "the information . . . is useful as reference for Department employees performing duties concerning the Swainson's hawk. . . . In fact the 'guidelines' reflect current biological information expected to be considered by Department employees on a site-specific basis when employees are dealing with Swainson's hawk mitigation issues." (P. 2).

Though not expressly invoking the internal management exception, these statements in substance raise that legal issue.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency*." (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states as follows:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implement [a Department rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Department's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes*. . . ." [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community' . . . [Citation]."[43]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself [,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody . . .."

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception . . .."[44]

Although the Department suggests that the Guidelines were mere instructions to staff, it does not specify *which* portions of the document constitute non-regulatory instructions, such as by specifying which units of the Department are responsible for specific tasks. OAL's independent review indicates that section III "Restoration of Swainson's hawk population," may be the staff-responsibility section. The following quotation from Guidelines section III illustrates[45][46] what this section contains:

"1. Support and acquire funding to continue research related to breeding success, contaminates, dispersal, movement, mortality, habitat use, and other identified research needs. Responsibility: DFG Nongame Bird and Mammal Section."

Nothing in Guidelines section III was included in the list of regulatory Guidelines provisions which appears in section III.B of this determination. Thus, though OAL does not reach the question of whether the staff-responsibility material falls within the internal management exception, OAL would agree that it does not violate Government Code section 11340.5.

By contrast, the regulatory Guidelines specified in section III.B concern more than the management of the *internal* affairs of the Department itself. As noted in section III.A of this determination, these regulatory Guidelines apply generally to all lead agencies and project sponsors planning development projects in the Central Valley of California.

Therefore, OAL concludes that the parts of the Guidelines found to be "regulations" do not fall within the internal management exception, and thus are not exempt from APA procedural requirements such as public notice and comment.

CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the matter is not moot. OAL cannot accept the Department's suggestion that the matter should be dropped because the challenged 1990 Guidelines have been revised since the request was filed. Having properly filed a request concerning a specific document, the Pacific Legal Foundation is entitled to a determination.

(2) this determination cannot encompass revisions made to the 1990 Guidelines after the request was filed. Under governing procedural regulations, OAL cannot accept the Pacific Legal Foundation's suggestion that OAL render an opinion in *this* determination concerning the validity of material that was not part of the request accepted by OAL.

(3) portions of the 1990 Guidelines are no more than items of scientific information which do not constitute "regulations," including, for instance, "Swainson's hawks weigh approximately 800-1100 gm. (1 3/4 - 2 lbs), and have about a 125 cm. (4 plus ft) wingspan." (p. 3.)

(4) the 1990 Guidelines contain "regulations" which were issued and utilized in violation of Government Code section 11340.5: for example, the statement that *the Department interprets the "take" clause in the California Endangered Species Act to include* not only the direct killing of individual hawks, but also *the destruction of either nesting or foraging habitat necessary to maintain the reproductive effort.* "Regulations" found in the Guidelines are specified in part III.B of this determination.

DATE: September 21, 1998

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ENDNOTES

1. This request for determination was filed by Robin Rivett of the Pacific Legal Foundation, 2151 River Plaza Drive, Suite 305, Sacramento, CA 95833-3881; telephone number (916) 641-8888. The Department of Fish and Game was represented by Ann S. Malcolm, Deputy General Counsel, Department of Fish and Game, Legal Affairs Division, P.O. Box 944209, Sacramento, CA 94244-2090; telephone number (916) 654-3821. OAL published a summary of this request, along with a notice inviting public written comment, in *California Regulatory Notice Register* 98, No. 26-Z, June 26, 1998, p. 1232.

   This determination may be cited as "**1998 OAL Determination No. 20.**"

2. Senior Staff Counsel Marc D. Remis contributed substantially to this determination.

3. Title 1, California Code of Regulations, section 123(b) and 126.

4. The Department correctly stated:

> "To be a valid request for determination, the requester must submit either a copy of the rule or a description thereof. Title 1, CCR section 122(a)(3)(A), and (B). With its request, PLF attached a copy of the [September, 1990] Guidelines. If PLF wants a determination regarding the [1994] Staff Report [containing the latest revision of the Mitigation Guidelines], it will have to submit a separate request for a determination which would put DFG on notice of its need to defend that [1994] document." (pp. 4-5.)

5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), Subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is invalid and unenforceable unless:
>
> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied

(finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)--had not yet been adopted pursuant to the APA, and was therefore "invalid").

OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*. Furthermore, *Tidewater* holds that an agency rule issued in violation of the APA is "void," but that agency action based upon the voided rule will not be automatically invalidated.

6. Established by the Statutes of 1951, chapter 715, section 4 and chapter 1613, section 28, and Stats 1957, chapter 456, section 700. (Fish and Game Code section 700.)

7. Fish and Game Code section 703.

8. Commercial salmon fishing is an example of an area in which the Department has sole responsibility for adopting regulations.

9. The pre-1996 version read "The provisions of this code shall be *administered* and *enforced* by the department." (Stats. 1957, c. 456, p. 1326, sec. 702; emphasis added.) The 1996 amendment granted the Department express rulemaking authority, whereas prior to that date in some cases it may have needed to rely on implied rulemaking authority when adopting regulations. Under the pre-1996 version, the Department nonetheless was required to follow the APA when issuing general rules which implemented, interpreted, or made specific "the law *enforced* or *administered* by it." (Emphasis added.)

10. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also part of Title 2 of the Government Code: Chapter 3.5 of Part 1 of Division 3.

11. Government Code section 11342, subdivision (a).

12. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

13. Fish and Game Code section 702. 1998 OAL Determination No. 4, note 21, states that section 702 "specifically" requires that the Department's regulations be adopted pursuant to the APA. It would more accurate to state that since (1) section 702 requires the Department to administer and enforce the Fish and Game Code through adopted regulations, and (2) California state agency regulations may only be adopted pursuant to the APA (absent an express statutory exemption), therefore, one may infer from section 702 a legislative intent that the Department adopt regulations in compliance with APA requirements.

14. Fish and Game Code section 2062.

15. Fish and Game Code section 2067.

16. Fish and Game Code section 2075.5.

17. Government Code section 11342, subdivision (g), requires general rules governing agency "procedure" to be adopted pursuant to the APA.

18. Fish and Game Code section 702.

19. CEQA establishes additional requirements for consultation, beyond what CESA requires. See Kostka & Zischke, *Practice Under the California Environmental Quality Act*, Continuing Education of the Bar (1997). There is no need to review CEQA procedures in this determination. It is clear that the challenged Guidelines implement, interpret and make specific CESA, as specified below.

20. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244.

21. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? |Para.| Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (**1987 OAL Determination No. 10**, *supra*, slip op'n., at p. 8.)"

OAL's wording of the two-part test, drawn from Government Code section 11342, has

been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in *California Regulatory Notice Register* 96, No 8-Z, February 23, 1996, p. 292.

22. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

23. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

24. (April 6, 1988, Docket No. 87-011), California Regulatory Notice Register 88, No. 16-Z, April 15, 1988, p.

25. *Grier v. Kizer*, 268 Cal.Rptr. at 253.

26. Cf. *State Water Resources Control Board v. Office of Administrative Law* (1990) 12 Cal.App.4th 697.

27. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.

28. *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 892 ("we agree with the OAL that an informal rule which creates a presumption and then indicates how to rebut it is a regulation with the meaning of the APA. (1987 OAL Determination No. 10. . .)"

29. The Department did not provide specific examples of provisions of the Guidelines that merely restate existing law. The response stated that, in large part, the Guidelines set out the mitigation requirements of CESA and CEQA. (p. 4.)

30. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274.

31. *Id.*, 275.

32. Guidelines, p. 8.

33. Request, p. 4.

34. The Department did cite two recent legal opinions concerning the Guidelines interpretation of the "take" clause, but did not discuss the opinions' treatment of that issue. One opinion was from the Attorney General (78 Ops.Atty.Gen. 137 (1995)), the other from the Legislative Counsel (Ops.Cal.Legis. Counsel, No. 109094 (May 23, 1994)(Assem. J. P. 6825)).

35. 8 Cal.App.2d 222, 11 Cal.Rptr. 222.

36. The brief had addressed the federal Endangered Species Act (16 U.S.C. sec. 1531 et seq.).)

37. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. *Cf. Winzler & Kelly v. Department of Industrial Relations* (1981) at 126, at 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations from the APA, typically apply across the board to all state agencies and are found in the APA.

38. Government Code section 11346.

39. (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25.

40. 12 Cal.App.4th at 703.

41. *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560.

42. Under federal rulemaking law, "interpretive" rules of federal regulatory agencies are not subject to notice and comment requirements. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198,202-202, 149 Cal.Rptr. 1, 2. By contrast, "interpretive" rules of California state regulatory agencies are subject to California statutory notice and comment requirements because the Legislature has not expressly exempted such rules from the APA by statute. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576, 59 Cal.Rptr.2d 186.

43. *Grier* (1990) 219 Cal.App 3d 422, 436 fn.10, 268 Cal Rptr. 244, 252-253.) cites *Armistead* citing *Poschman* for support on this point. Note that *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.)

44. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

45. Guidelines section III consists of about half a page of material on pages 10-11.

46. Guidelines, p. 8.